



IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE
COMPANY, a corporation,
Respondent.

**RESPONSE TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT**

Thomas G. Smith
P. O. Box 146
Purcell, Oklahoma 73080

and

Charles B. Grethen
P. O. Drawer D
Purcell, Oklahoma 73080

Attorneys for Petitioner

July, 1978

TABLE OF CONTENTS

	<i>Page</i>
Opinion Below	1
Statutes Involved	1
Statement of the Case	2
Reasons for Granting This Writ	2
Conclusion	7
Appendix A:	
47 O.S. 7-324 (f)	1a
47 O.S. 7-601	2a

TABLE OF AUTHORITIES

CASES:

Allstate Insurance Company v. Charneski, 286 F.2d 238 (7th Cir. 1960)	2
American Fidelity & Casualty Company v. Service Oil Company, 164 F.2d 478 (4th Cir. 1947)	3
Fireman's Fund Insurance Company v. Dunlap, 317 F.2d 443 (4th Cir. 1963)	4
Till v. Hartford Accident and Indemnity Company, 124 F.2d 405 (4th Cir. 1941)	5

STATUTES:

47 O.S. § 7-324 (f) (1)	5-6
47 O.S. § 7-601	7

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 56, Section (c)	6
United States Supreme Court Rules, Rule 19, Section (1) (b)	2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE
COMPANY, a corporation,
Respondent.

**RESPONSE TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT**

OPINION BELOW

The opinion of the Court below in Farmer's Alliance Mutual Insurance Company v. Jones, et al., is reported at 570 F.2d 1384 (10th Cir. 1978), and is appended to the Petition for Writ of Certiorari.

STATUTES INVOLVED

The statutes involved are 47 O.S. 7-324 (f) and 47 O.S. 7-601 which are set out verbatim and printed in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner's factual statement of the case is contained in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THIS WRIT

This Writ should be allowed for the reason that the opinion delivered by the Circuit Court of Appeals in this case is in conflict with the decision of at least one other Court of Appeals on two of the issues presented by the case. This is a proper ground for review as stated by the Supreme Court in Rule 19 (1)(b) of the Supreme Court Rules, which provides that review may be granted:

"(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter."

The decision of the 10th Circuit Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals for the 7th Circuit in the case of *Allstate Insurance Co. v. Charneski*, 286 F.2d 238 (7th Cir. 1960). Respondent in their Brief in Opposition to the Petition for Certiorari sought to distinguish the decision of the Court in the *Charneski* case. The Respondent in so doing ignored the basis for the decision relied upon by the Court in the *Charneski* case. The Court in *Charneski* refused to allow a federal declaratory judgment action where the same was denied by state laws and where jurisdiction of the Federal Court was sought to be invoked by diversity of citizenship. In *Charneski* at page 243, the Court states:

"The essence of diversity jurisdiction is that a Federal Court enforces state law and state policy."

The Court at page 244 states:

"Federal interest to be served here is slight."

These statements by the Court indicate that the basis for their decision was respect for a state policy against the type of relief being sought in Federal Court which was specifically denied in state court. Respondents in the present case attempt to gain in Federal Court what is specifically denied in state court by the statutes of the State of Oklahoma. The Oklahoma Statute denying the respondent the right to bring a declaratory judgment action to determine coverage under an insurance policy until the issue of liability has been decided is demonstrative of Oklahoma's state policy against the same.

The Circuit Court of Appeals for the 4th Circuit has also considered this issue in the case of *American Fidelity & Casualty Company v. Service Oil Company*, 164 F.2d 478 (4th Cir. 1947). In discussing an application for a federal declaratory judgment action where the case was pending before the state courts, the Court of Appeals for the 4th Circuit stated:

"There could be no possible justification for dragging into the Federal Court the litigation of issues pending in the state court for the sake of obtaining a declaratory judgment as to a matter that will have no practical significance if the defendants prevail in the state court, and which the company can litigate as well after the termination of the state court litigation is now if the defendants do not prevail."

The exact action which was condemned by this decision of the 4th Circuit was permitted by the 10th Circuit in the present case and, therefore, the action of the 10th Circuit is in direct conflict with the decision of the 4th Circuit in the *Service Oil Company* case.

In summary, it appears that there is no strong federal

interest in maintaining this type of declaratory judgment action while the State of Oklahoma has a state policy against the maintenance of such an action prior to the adjudication of liability in a tort action. It then follows that the Federal District Court should have honored this state policy and declined to hear this declaratory judgment action.

The decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the 4th Circuit in the *Fireman's Fund Insurance Co. v. Dunlap*, 317 F.2d 443 (4th Cir. 1963). In the *Fireman's Fund* case the insured, under an insurance policy whose terms were identical to those involved in this action, agreed with the insurer on the issues of whether the driver of the insured's automobile had the insured's consent and whether the driver was covered by the insurance policy. The insured in that case cooperated with the insurer in investigating and defending the claim. The facts of the case at hand are comparable to the facts of the *Fireman's Fund* case. The insured here, Spann Chevrolet Company, through its officer, Orval Spann, agreed with the insurer on the issue of consent, and on the issue of coverage by the insurance policy, as is demonstrated by his statement which he gave to the insurance company subsequent to the accident. Orval Spann also cooperated with the insurer by giving his statement immediately after the accident, expressing in the statement that E. L. Shippey did not have permission to drive the automobile, and that neither he nor the insurer, Farmers Alliance, should be responsible or liable for the accident. The 4th Circuit in the *Fireman's Fund* case held that the agreement as to the permission destroyed the only actual controversy that existed between the insurer and

insured. The 4th Circuit further determined that the insurer's allegation of controversy between itself and its insured because of the insurer's duty to defend the lawsuit was only nominal and without merit due to the expressed terms of the contract itself. By analogy, it can be concluded that if the 4th Circuit had heard the present case, it would have determined that there was no controversy between Spann Chevrolet Co. and Farmer's Alliance and would have realigned Spann Chevrolet Co. as party plaintiff, thereby destroying diversity of citizenship and depriving the Federal Courts of jurisdiction.

The case of *Till v. Hartford Accident and Indemnity Company*, 124 F.2d 405 (4th Cir. 1941), cited by the Respondent further demonstrates that decisions of the 10th Circuit and the 4th Circuit are in conflict on this issue, thereby establishing grounds upon which this review may be granted.

The granting of the summary judgment by the District Court was improper for several reasons. Petitioners alleged and presented evidence to the effect that Wanda C. Spann, an insured under the insurance policy, had pursued a course of conduct which demonstrated her implied consent to third parties driving the automobile given to Melissa Spann for her use. This implied consent by Wanda C. Spann brought any third party driving the vehicle within the coverage of the insurance policy in question.

Respondent relied on the statements of its insureds to defeat coverage under the insurance policy. This action by the respondent was contra to state policy as demonstrated by Oklahoma Law. 47 O.S. § 7-324 (f)(1) in reference to provisions incorporated in motor vehicle liability policies states:

"1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury to damage; NO STATEMENT MADE BY THE INSURED OR ON HIS BEHALF AND NO VIOLATION OF SAID POLICY SHALL DEFEAT OR VOID SAID POLICY." (Emphasis ours)

Without the statement of its insured, Farmers Alliance had no basis upon which to deny liability under the policy, and the issue of implied consent remained undecided.

The matter of implied consent was a material fact concerning which there was a genuine controversy which had not been resolved. Under Rule 56(c) of the Federal Rules of Civil Procedure, a summary judgment should not be granted unless it is shown that there is no genuine issue as to any material fact. Respondents failed to meet this burden, and, therefore, were not entitled to the summary judgment.

The automobile accident in question occurred on May 20, 1976, in which Alan Jones and Craig Lee McCracken were severely injured. At that particular time, the Oklahoma legislature was in the process of passing an act known as compulsory automobile liability insurance requiring owners of motor vehicles registered in the state to maintain at all times security at not less than the limits of liability required under the Financial Responsibility Law of the State of Oklahoma. This Act was approved June 1, 1976, and was to become operative December 11, 1976.

The Act is 47 O.S. § 7-601 and provides in part as follows:

"Every owner of a motor vehicle registered in this state, other than a licensed used car dealer, shall, at all times, maintain in force with respect to such vehicle security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation, or use of the vehicle.***"

The appellants would argue that as a matter of legislative policy and social justice, the Oklahoma Legislature in deliberating at the time of the accident approved on June 1, 1976, with an effective date of December 11, 1976, was expressing a policy of social justice that, when persons are injured as a result of the ownership, maintenance, operation or use of a motor vehicle, security in the form of an insurance policy, cash, securities or self-insurance would be available to pay for the damages resulting therefrom. What the appellee has attempted to do is to circumvent the law by declaring non-liability on the policy without a determination in the state court whether liability for damages will be imposed as a result of the operation or use of the vehicle.

CONCLUSION

The Petition for the Writ of Certiorari should be granted. The decision rendered in this case is in conflict with the decisions rendered on the same issues by the Courts of Appeals for the 4th Circuit and 7th Circuit. The evidence presented to the trial court was not decisive as to the material issues and, therefore, was not a sufficient ground for a summary judgment. The insurance company herein

was allowed to avoid the operation of Oklahoma state policy by the prior decisions of the District and Circuit Court, therefore, petitioners pray that the decision of the trial court and the Circuit Court of Appeals for the 10th Circuit be reviewed by this Honorable Court and reversed.

Respectfully submitted,
Thomas G. Smith
P. O. Box 146
Purcell, Oklahoma 73080

and

Charles B. Grethen
P. O. Drawer D
Purcell, Oklahoma 73080

Attorneys for Petitioner

July, 1978

APPENDIX A

47 O.S. § 7-324 (f):

(f) **Provisions incorporated in policy.** Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

2. The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage.

3. The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision 2 of subsection (b) of this section.

4. The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the entire contract-between the parties.

47 O.S. § 7-601. Limits of liability requirement

Every owner of a motor vehicle registered in this state, other than a licensed used car dealer, shall, at all times, maintain in force with respect to such vehicle security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle. As used herein, "security" means:

1. A policy or bond meeting the requirements of Section 7—204 of this title;
2. A deposit of cash or securities having the equivalency of limits required under Section 7—204 of this title as acceptable limits for a policy or bond; or
3. Self-insurance, pursuant to the provisions of Section 7—503 of this title, having the equivalency of limits required under Section 7—204 of this title as acceptable limits for a policy or bond.

Added by Laws 1976, c. 176, § 1, operative Dec. 11, 1976.

Sections 7, 8 and 9, of Laws 1976, c. 176, provided for codification of §§ 7—601 to 7—606, a general repealer of conflicting laws, and an operative date of December 11, 1976.

Title of Act:

An Act relating to motor vehicles; providing for compulsory automobile liability insurance; requiring owners of motor vehicles registered in the state to maintain at all times security at not less than the limits of liability required under the Financial Responsibility Law; providing for certification of security by such owners at the time of registration of the vehicles; providing for verification of security; providing for the sending of copies of notices of cancellation to the Motor Vehicle Department; providing for suspension of driver's licenses and vehicle registrations for failure to maintain such security; providing for a fine as an

additional penalty for failure to maintain such security; directing codification; repealing conflicting laws; and providing an operative date. Laws 1976, c. 176.

1. Construction and application

It is mandatory that a motor vehicle liability insurance policy issued on a motorcycle registered in the State of Oklahoma provide guest passenger personal insurance coverage. Op.Atty.Gen. No. 77-200 (July 27, 1977).

An individual who makes a false certification of the existence of security as required by 47 Okl.St. Ann § 7—602 is subject to a charge of perjury under the provisions of 21 Okl.St. Ann. § 491 and upon conviction thereof, subject to penalty as provided in 21 Okl.St. Ann § 500. Op.Atty.Gen. No. 76—389 (Jan. 25, 1977).

It is not a necessary element for a charge of perjury that penalty first have been imposed under provision of 47 Okl.St. Ann § § 7—605 and 7—606. Id.

An adjudication of guilt of a violation of the provisions of this section would not preclude the filing of charges under 21 Okl.St. Ann # 491, or vice versa, inasmuch as the elements of the crimes established in the two sections under consideration are separate and distinct. Id.